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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1090

WOO CHENG HWA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES AND REGULATIONS INVOLVED 2
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE WRIT 5
CONCLUSION 9

CITATIONS

CASES:

Application of Paktorovics, 156 F. Supp. 813 (S.D. N.Y. 1957) 6
Chan Hing and Lai Cho v. Esperdy (Sup. Ct., No. 1038) 6
Do v. Esperdy, 309 F.2d 467 (2d Cir. 1962) 7
Koshland v. Helvering, 298 U.S. 441, 447 (1936) 7
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1938) 7, 9
Sun v. Barber, 144 F. Supp. 850 (N.D. Calif. 1956) 7
Tai Mui v. Esperdy (Sup. Ct., No. 1037) 6
United States v. Atchison T. & S. F. R. Co., 220 U.S. 37 (1910) 9

STATUTES AND REGULATIONS:

Code of Federal Regulations:
8 C.F.R. 204.1 6
8 C.F.R. 235.9 3
8 C.F.R. 245.1(d) 4
8 C.F.R. 245.4 4
Displaced Persons Act of 1948, 62 Stat. 1009, 64 Stat. 219 7
Fair Share Refugee Act, July 14, 1960, 74 Stat. 504 8

Immigration and Nationality Act:
Section 203(a)(7), 8 U.S.C. 1153(a)(7), 79 Stat. 913 2

Section 245, 8 U.S.C. 1255 3

Refugee Relief Act of 1953, 67 Stat. 400 7

MISCELLANEOUS:

Gordon and Rosenfield, Immigration Law and Practice (1966) 6, 8

House Report 745, 89th Cong., 1st Sess. 8, 9

Senate Report 748, 89th Cong., 1st Sess. 8

Wasserman, Asylum for the Displaced - A Fifth Freedom, Federal Bar Association Journal, January, 1948 5

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Woo Cheng Hwa petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit filed on December 9, 1966, denying review of an order of the Board of Immigration Appeals dated May 25, 1966 (R. 22, 29, 48).

OPINION BELOW

The opinion of the Court of Appeals is dated December 9, 1966, is not reported and is set forth in Appendix A (R. 29).

JURISDICTION

The judgment of the Court below is dated and was entered (R. 49) on December 9, 1966 (Appendix B). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Where the Attorney General is authorized to confer preference status as conditional entrants under the quota limitations upon alien refugees in non-Communist countries [8 U.S.C. 1153(a)(7)] is it proper for him to issue regulations precluding the issuance of such status to refugees in the United States?

2. Where the Attorney General is authorized to grant permanent residence (adjustment of status) to alien refugees from Communism who have been physically present within the United States for two years [8 U.S.C. 1153(a)(7)], is he limited by the provisions of 8 U.S.C. 1255 and precluded from granting adjustment or permanent residence to alien crewmen?

STATUTES AND REGULATIONS INVOLVED

Section 203(a)(7) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(7), 79 Stat. 913, provides:

> "(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist dominated country (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist of Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opin-

ion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, that immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status."

Section 245 of the Immigration and Nationality Act as amended (8 U.S.C. 1255), provides:

"(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

8 Code of Federal Regulations 235.9 effective March 31, 1966 (31 F.R. 5118) provides in part:

"§ 235.9 Conditional entries.

"(a) Countries in which applications may be filed. Pursuant to agreements entered into with the governments of the countries concerned, officers of the Service are authorized to accept applications and to examine the qualifications of applicants for conditional entry under section 203(a)(7) of the Act in Austria, Belgium, France, Germany, Greece, Italy and Lebanon. Applications for conditional entry may be filed only by aliens who are physically present within one of the designated countries.

"(c) Application. A separate application for conditional entry under section 203(a)(7) of the Act shall be executed and submitted by each applicant on Form I-590 to the officer in charge of the nearest Service office outside of the United States. Each applicant under this paragraph shall appear in person before an immigration officer and excepting a child under 14 years of age shall, prior to the adjudication of his application, be interrogated under oath concerning his eligibility for conditional entry into the United States. * * * The approval of an application by an officer in charge outside the United States authorizes the district director at a port of entry to effect the conditional entry of the applicant upon arrival at such port within 4 months after the date of the approval. * * *"

8 Code of Federal Regulations 245.1(d) provides in part:

"(d) Immediate relatives under section 201(b) and preference aliens under section 203(a)(1) through 203(a)(7).

"* * * An alien who claims preference status under the proviso to section 203(a)(7) of the Act is not eligible for the benefits of section 245 of the Act as provided in §245.4 unless the District Director has approved the alien's Application for Classification as a Refugee under the Proviso to Section 203(a)(7), Immigration and Nationality Act."

8 Code of Federal Regulations 245.4 provides:

"§ 245.4 Adjustment of status under the proviso to section 203(a)(7) of the Act.

"The provisions of section 245 of the Act and this part shall govern the adjustment of status provided for in the proviso to section 203(a)(7) of the Act. Processing of applications for adjustment under the proviso to section 203(a)(7) and this section shall be initiated in each district in the chronological order in which the applicants last arrived in the United States. An alien who claims he is entitled to a preference status pursuant to the proviso to section 203 (a)(7) of the Act shall execute and attach to his application for adjustment of status Form I-590A, Application for Classification as a Refugee under

the Proviso to section 203(a)(7), Immigration and Nationality Act. The determination as to whether an alien is entitled to the claimed preference status shall be made by the district director; no appeal shall lie from his determination." (31 F.R. 536, January 15, 1966.)

STATEMENT OF THE CASE

Petitioner, a native of China, entered the United States as a crewman on June 12, 1963, overstayed and on April 18, 1965, was ordered deported to Taiwan. On May 16, 1966, he filed an application with the District Director of the Immigration Service in New York for refugee status pursuant to 8 U.S.C. 1153(a)(7). At the same time he sought reopening of his deportation case requesting adjustment of his status to that of a permanent resident. His application for refugee status has not been processed or decided. His application for adjustment was denied by the Board of Immigration Appeals on May 25, 1966 (Appendix C) upon the ground that relief was only available under 8 U.S.C. 1255 and that such relief was unavailable to alien crewmen.

Review was sought in the Court of Appeals on May 27, 1966 (R. 28). The Court noted that the statute might have been clearer but that Congress intended to exclude from the refugee preference those (alien crewmen) who could not qualify under 8 U.S.C. 1255 (R. 42). Upon this basis, petitioner's request for judicial review was denied.

REASONS FOR GRANTING THE WRIT

1. For the first time in the history of our immigration laws, Congress enacted permanent refugee legislation on October 3, 1966 [8 U.S.C. 1153(a)(7), 79 Stat. 913]. Prior legislative enactments and practices had been of a temporary character.[1] This litigation, affecting a poten-

[1] For the historical background prior to the Displaced Persons Act of 1948, see *Wasserman, Asylum for the Displaced - A Fifth Freedom, Federal Bar Association Journal*; January, 1948. In 1948 Congress enacted the Displaced Persons Act (62 Stat. 1009,

tial 10,200[2] refugees annually [8 U.S.C. 1153(a)(7)] seeks an interpretation of the statute which the Court below acknowledged might have been written in clearer language (R. 42).[3]

Our quota limitations spell out seven categories of preferences for aliens [8 U.S.C. 1153(a)]. Each of the first six preferences are available to aliens within and outside the United States.[4] Applications are filed with District Directors of the Immigration Service in the United States or abroad.[5] The statute reserves the seventh preference for refugees who have fled Communism, persecution, or catastrophic natural calamities. It requires that applications for such preference be filed with the Immigration Service "in any non-Communist or non-Communist dominated country." By regulation, 8 C.F.R. 235.9 (31 F.R. 5118), the Attorney General adds and reads

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64 Stat. 219). The Refugee Relief Act of 1953 (67 Stat. 400) followed. In 1960 legislation authorized the admission of a limited number of refugees-escapees under the mandate of the United Nations High Commissioner for Refugees (74 Stat. 504).

After 1956 Hungarian refugees from Communism were paroled into the United States pursuant to 8 U.S.C. 1182(d)(5). See: *Application of Paktorovics*, 156 F. Supp. 813 (S.D.N.Y., 1957). Chinese refugees in Hong Kong and Cuban refugees have been accorded similar privileges, 1 *Gordon and Rosenfield, Immigration Law and Procedure*, pp. 6-36, 37 (1966).

[2] 8 U.S.C. 1153(a)(7) makes available up to 6% of the 170,000 annual quota numbers or 10,200 for conditional entrants and one-half of this number, or 5,100 for adjustment of status.

The issues presented herein are similar to those presented in *Tai Mui v. Esperdy* (Sup. Ct. No. 1037) and *Chan Hing and Lai Cho v. Esperdy* (No. 1038) in which petitions were filed on February 7, 1967. Those cases were decided below in a joint opinion with that of petitioner. However, they present jurisdictional questions not involved in the instant case.

[3] The statute has been characterized as "somewhat ambiguous". 2 *Gordon and Rosenfield*; *supra*, pp. 7-78.

[4] The first six preferences are reserved for relatives or those possessing certain skills.

[5] 8 C.F.R. 204.1 (December 1, 1965).

into the statute the words "other than the United States" and excludes applications for seventh preference in the United States. Under the regulations only those who are in Austria, Belgium, France, Germany, Greece, Italy and Lebanon may apply. The regulations fly in the face of this Court's mandate forbidding amendment by regulations where the enactment is unambiguous. *Koshland v. Helvering*, 298 U.S. 441, 447 (1936). Moreover, they disregard the principle of statutory construction that remedial legislation should be liberally construed. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938); *Do v. Esperdy*, 309 F.2d 467 (2d Cir. 1962); *Sun v. Barber*, 144 F. Supp. 850 (N.D. Calif. 1956).

Whether the regulatory restriction excluding numerous refugees within the United States from the benefits of this preference is valid is an issue which should be decided by this Court.

2. The 1965 statute authorizes the grant of permanent immigrant visas to refugee aliens "who have been in the United States for a period of at least two years prior to application for adjustment of status." The Court below sustained a regulation which precludes such benefits to alien crewmen. The Immigration Service requires that such adjustment application be filed under 8 U.S.C. 1255 which denies adjustment to alien crewmen 8 C.F.R. 245.4.

The history of adjustment enactments and procedures for alien refugees discloses that its benefits have been usually extended to alien crewmen. Under the Displaced Persons Act of 1958 alien crewmen refugees within the United States were permitted to seek adjustment as permanent residents (62 Stat. 1009, 50 U.S.C. App. 1953). Under the Refugee Act of 1953 alien crewmen refugees were granted such adjustment [67 Stat. 400, 50 U.S.C. App. 1971(d)]. Adjustment was not channeled and limited to Section 245 (8 U.S.C. 1255). Hungarian (72 Stat. 419) and Cuban refugees (Public Law 89-732, 80 Stat. 1161), are likewise outside the operation of Section 245. The historical background, since the very inception of Section

245 has been to take refugees outside its operation and to accord them special treatment. *2 Gordon and Rosenfield, Immigration Law and Practice (1966)*, pp. 7-75.

In the grant of adjustment under Section 245, a quota number is deducted. No immigration visa is issued. Under the 1965 statute there is specific provision for making immigration visas available to those who qualify for adjustment. This clearly points to a procedure outside section 245. Refugees admitted as conditional entrants under 8 U.S.C. 1153(a)(7) are not required to pursue Section 245 adjustment. "The statute provides for a procedure which simulates the initial entry process," *2 Gordon and Rosenfield, supra*, pp. 7-77. Congress surely did not provide in the same section [8 U.S.C. 1153(a)(7)] for two types of adjustment, one outside Section 245 for refugees classified as conditional entrants, and one within Section 245 for other refugees. On the contrary, it was stated that Congress desired to conform to practices under the Fair Share Refugee Act (Act of July 14, 1960, 74 Stat. 504). *House Report* 745, 89th Cong., 1st Sess., p. 15. *Senate Report* 748, 89th Cong., 1st Sess., p. 16.

In the cases under the Fair Share Refugee Act and in the instant case, two years' presence in the United States is required, a provision not incorporated in Section 245. And in these cases the limitation of Section 245 barring alien crewmen is removed. Finally, it should be noted that if conditional entrants alone are eligible for adjustment outside Section 245, petitioner seeks by his administrative applications herein to be so designated.

The Court below sought support in the legislative history of the 1965 Act, noting, however, that such history was not too persuasive (R. 43). *Senate Report* 748, p. 22, observes that "It is contemplated that such adjustments will be made under Section 245." This was at a time when the legislative proposal was to grant such relief to alien crewmen. (*Senate Report* 748, *supra*, p. 20.) There was no concurrence upon this contemplated procedure or upon

the proposal to grant Section 245 benefits to crewmen by the House of Representatives. On the contrary, the section by section analysis by the House of Representatives Committee contains identical language as the Senate Report but it specifically omits the statement that adjustment will be made under Section 245 (*House Report* 745, *supra*, p. 22). This omission points to a conflict in interpretation by coordinate branches of Congress.[6] Upon this ambiguous history, the Court below resolved remedial statutory language strictly rather than liberally, contrary to *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1938), *Do v. Esperdy*, 309 F.2d 467 (2d Cir. 1962).

Whether refugee alien crewmen who have been in the United States for two years may apply for adjustment or whether Congress has denied them the benefits of this ameliatory legislation is an issue which merits this Court's attention.

CONCLUSION

Certiorari should be granted and the judgment below should be reviewed.

Respectfully submitted,

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[6] The presence of the statement in the Senate Report and not in the House Report is an argument against reading it as implied by the House Committee. See *United States v. Atchison T. & S.F.R. Co.*, 220 U.S. 37 (1910).

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